No. 22693

UNITED STATES

COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES NATIONAL BANK OF
OREGON, PORTLAND, OREGON,

Appellant,

v.

ASOCIACION de AZUCARERos de
GUATEMALA 4a. Av. 14-53(1)
GUATEMALA CITY, GUATEMALA,

Appellee.

APPELLEE'S BRIEF

Appeal from the United States District Court
for the District of Oregon

Honorable Robert C. Belloni, Judge

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STATEMENT OF ISSUES

1. Is there evidence to support the District Court finding that the Bank's cable of August 26, 1966, was false?

2. Is the issuer of a commercial letter of credit discharged from its obligation when the beneficiary, after obtaining judgment against the issuer on the letter of credit, releases other claims against the issuer's insolvent customer?

SUPPLEMENTARY STATEMENT OF FACTS

On June 7, 1966, the United States National Bank of Oregon (hereafter the Bank) issued its Irrevocable Commercial Letter of Credit No. 11561 to the Asociacion de Azucareros de Guatemala (hereafter the Association). By this Letter of Credit, the Bank agreed to pay 95 percent of invoice value upon presentation of documents evidencing August shipment by the Association of:

> "'5,000 Long Tons, ... more or less, Guatemala Bulk Raw Centrifugal Sugar of the 1965/66 crop, F.O.B. Stowed Guatemalan Port, basis 96 degrees minimum polarization'." (R. 104, 71)

The Bank's Letter of Credit was not an instrument of guarantee or surety. It was a typical irrevocable commercial letter of credit--a primary promise to pay the shipper on presentation of documents showing goods had been shipped. It contained no reservations. It was not conditioned on the failure of the consignee to pay for the sugar.

On August 15, 1966, the Association shipped the sugar on the SS Gardenia, and immediately dispatched the shipping documents to the Bank. The Bank received the shipping documents on August 22 (R. 72). Its obligation to pay was then fixed.

The Bank had previously received a back-to-back letter of credit from Schroder & Co.,acting for the ultimate purchaser of the sugar, by which Schroder promised to pay the Bank for the sugar when the Bank forwarded the shipping documents to Schroder (Ex. 19). Accordingly, when the Bank received the documents from the Association, it forwarded copies to Schroder & Co., and received full payment

from Schroder & Co., on August 26, 1966, in the amount of $548,366.45 (R. 72).

The sugar was unloaded at Gramercy, Louisiana, between August 22 and August 24, 1966 (R. 72). On August 26, the consignee of the sugar, Philip S. Greenberg and PSG Co. (hereafter Greenberg), falsely advised the Bank that the sugar was defective and asked the Bank to send the Association a cable over the Bank's signature stating "polarization below credit requirement." Without varifying this profoundly important representation, the Bank sent such a cable, and in it, also at Greenberg's instigation, asked the Association on that account to agree to an amendment to the letter of credit reducing the Bank's obligation to 75 percent of the invoice value of a portion of the sugar (R. 73). (The Court below found that the Bank's cable was false and misleading (R. 107).) The Bank did not advise the Association that Schroder had already paid. The Association, relying on the

Bank's misstatement, agreed to this first amendment of the letter of credit (R. 107). The Bank then paid the Association $279,331.92, representing 75 percent of the invoice value of the first portion of the shipment (R. 73).

Then, on September 14--again at Greenberg's urging and again with no attempt to verify what he said--the Bank sent a second cable which again falsely reported that the sugar was deficient and again requested a reduction of the Bank's obligation under the Letter of Credit to 75 percent of the remaining portion of the shipment--less "charges" to be incurred by PSG. Again the Bank failed to tell the Association that Schroder had paid in full on the Schroder letter of credit. This time, the Association rejected the proposed amendment to the Letter of Credit (R. 108). (The Court below found that this Bank cable was also false and misleading (R. 108).)

By this time, the Bank had received payment of $548,366.45 from Schroder & Co. It

had paid the Association only $279,331.92. It kept $75,000.00 to apply against a debt owed by Greenberg to the Bank, and turned the rest of the Schroder money over to Greenberg. Greenberg was by then in dire financial straits--as the Bank well knew--and quickly used the Schroder money to pay other debts.

Thus, by September 27, the proceeds from the sale of the sugar had been dissipated. The Bank was apparently intent on not paying the Association--even though it had received the shipping documents a month earlier--until it was certain it would be paid by Greenberg. Greenberg was unable to pay. So instead, on that day, he told the Bank that he had expended $132,827.91 in gaining admission of the sugar into the United States--again, a falsehood--and therefore that the Bank only owed the Association $7,508.37 (R. 108). The Bank made no independent investigation of the non-existent entry charges and instead embraced

the fiction and so advised the Association. (Bank counsel later admitted the Bank's claim of entry charges was false (R. 74) and the Court below so found (R. 108).) The Bank then tendered $7,508.37 in final payment for the sugar. The Association refused and, on December 14, 1966, sued both the Bank and Greenberg (R. 1).

The Association's complaint as to the Bank sought recovery solely on account of the Bank's failure to pay some $250,000 still due under its Irrevocable Commercial Letter of Credit on the Gardenia shipment (R. 4-6). The complaint as to Greenberg, on the other hand, was for recovery of money still owing on an earlier sugar shipment on the SS Ojeda (R. 3-4) for approximately $150,000 of agency commissions because of Greenberg's various breaches of his fiduciary duties as agent for the Association (R. 6-7), for his personal profits on a variety of other transactions (R. 7-8), and for his violation of the

Robinson-Patman Act (R. 8-9)--in addition to a claim that Greenberg was secondarily liable for the purchase price of the Gardenia sugar shipment (R. 4-6). Greenberg counter-claimed against the Association for a variety of matters also unrelated to the Gardenia shipment (R. 42-45).

At plaintiff's request, therefore, the Court ordered that the Association's case against the Bank be tried first (R. 129). Plaintiff's counsel advised the Court at the Pretrial Conference that a preliminary determination of the Bank's liability was appropriate because it might avoid a useless trial of the Greenberg case. Bank counsel interposed no objection (R. 129) and made no claim that a settlement with Greenberg would discharge the Bank. Instead, the Bank entered into a companion stipulation with Greenberg for the entry of judgment against him for any amount the Association recovered from the Bank (Ibid).

At the trial, the Bank made various contentions, including the contentions

-- that it was entitled to deduct the nonexistent entry "charges," as to which the court determined that "Those purported charges were fictitious and the Bank had no authority to deduct them from the draft" (Tr. 308-309); and

-- that the shipping documents were inadequate, a theory the Court characterized as "clearly an afterthought," and part of a "desperate effort to extricate themselves from their predicament" (Tr. 309).

The Court concluded that (Tr. 310):

> "The most charitable statement I can make about the Bank's accepting Greenberg's various statements and representations is that it was gross negligence."

The Court therefore held, prior to any determination of the claims between Greenberg and the Association, that the Bank was liable to the Association on its Irrevocable Commercial Letter of Credit. The opinion giving judgment

in favor of plaintiff was announced on Friday, October 27, 1967 (Tr. 305-312).

In the course of the trial against the Bank, counsel for Greenberg and the Association agreed that a trial involving the independent issues between Greenberg and the Association would be fruitless. Greenberg had no assets, and his counterclaims were asserted apparently only for defensive purposes. The Gardenia question would, it appeared, be settled in the proceeding against the Bank. Accordingly, Greenberg and the Association agreed not to go forward with that second trial, which would for all practical purposes have involved issues in which the Bank had no interest in any event. This was to avoid a wasteful expenditure of the time of the Court, the attorneys and the witnesses. Neither Greenberg nor the Association had any notion that they could affect the Bank, or limit its liability to the Association on the Gardenia Letter of Credit, in this way.

At the time, the Bank was apparently of the same view. The arrangement was brought to the attention of the trial judge in a conference in chambers (R. 129). Bank counsel attended and was fully advised of the proposal not to pursue the claims against Greenberg. He entered no objection (R. 129-130). And he made no suggestion that such a settlement with Greenberg could also wipe out the Association's claim against the Bank--which was at that very moment in mid-trial.

After the Court announced its decision to enter judgment against the Bank on the Gardenia Letter of Credit on Friday, October 27, 1967, the Court Clerk advised counsel that either the Greenberg issues be formally settled and dismissed by the following Monday morning, October 30, 1967, or Greenberg and the Association would go to trial on those issues that day (R. 130). At this point, the Gardenia issues were, for all practical purposes, determined as a result of the decision in the Bank trial; also at this

point, a trial against Greenberg had even less to commend it than before. Accordingly, a mutual release was prepared and executed October 28, 1967, and a stipulation of dismissal of the issues between the Association and PSG Co. and Philip S. Greenberg filed on October 30, 1967 (R. 132, 102).

As the later Affidavit of counsel to the Association stated (R. 130-131):

> "The Asociacion entered into such release only because it knew at the time of the release that Greenberg had a judgment against him in the amount of the Asociacion's judgment against the Bank and the costs of future litigation could thereby not be justified. The only incentive for the Asociacion's release of the remaining claims against Greenberg was the fact of his insolvency." (R. 130-131)

After judgment was entered against the Bank (R. 113), the Bank moved to set aside the judgment on the theory that the Association's release of Greenberg in fact also released the Bank (R. 117). The Court heard argument, considered affidavits of counsel (R. 122, 125, 128) and denied the motion (R. 135).

ARGUMENT

I. There was ample evidence to support the District Court's determination that the Bank's cable of August 26 was false.

The Bank challenges the actual result of the trial below on only one ground. It contends that its cable to the Association of August 26, 1966--"polarization below credit requirement"--was not in fact false.

There was ample evidence to support the determination of the trial judge. The sugar was not below the "credit requirement" of the Letter of Credit. As the Court said (Tr. 311):

> "The Bank, or at least Mr. Cornell, did not then understand, nor does it now understand the meaning of the /the trade term in the Letter of Credit/ basis ninety-six degrees minimum polarization."

The accepted trade meaning of the Letter of Credit provision was carefully explained by Mr. Bellamy, the experienced Manager of the Sugar Association, as follows:

> "Q Now, you will recall, Mr. Bellamy, that the Bill of Lading -- excuse me, the Letter of Credit in this case contains the words '96 degrees polarization'. Would you explain briefly the significance

of 96 degrees polarization as a standard in international sugar -- in sugar transactions with the United States?

"A Well, the actual meaning of 96 polarization is a reference to the purity or the polarity of the sugar; and it's recognized practically the world over in the sugar trade. * * * Raw sugar, as referred to in the sugar trade internationally, is defined that it must be sugar that would polarize between 94 and not above 98. Anything that polarizes between those two figures is recognized as raw sugar. * * *

"Q Now, what is the custom and practice in the trade with respect to payment between buyer and seller based on polarization? May I refer you, Mr. Bellamy, to Plaintiff's Exhibit No. 100, and specifically page 315 thereof, subparagraph 3, the bottom of that page, which is Chapter 7 of the By-Laws of the New York Coffee and Sugar Exchange. And I refer you to the system of premiums and penalties set out at the beginning of page 315 and going over to 316.

"My question, Mr. Bellamy, is, does this system of premiums and penalties, premiums paid to the seller of the sugar that eventually polarizes above 96 degrees, penalties -- that is to say deductions if the sugar polarizes less than 96 degrees, represent the standard custom and practice in the industry?

"A Yes, this is the standard that is used. The same one that is used on this page.

"Q Yes.

"A If it polarizes above the premium -- if it polarizes above, those are the penalties.

"Q And 96 degrees is the bench mark?

"A Yes, that is the recognized basis.

"Q But raw sugar is sold anywhere from 94 to 98 degrees?

"A Yes."

(Tr. 170-172)

"THE COURT: Mr. Bellamy, what is meant by the words in the letter of credit 'Basis 96 degrees minimum polarization'?

"THE WITNESS: Well, that is generally referred to as the basis for the price; that the price that is mentioned in the contract or in the letter of credit where it says -- in this case I think it was $5.70 per hundred pounds F.O.B. It meant that it would be $5.70 for sugar polarizing 96 degrees. And any polarization above or any polarization below would bear the penalties or the premium according to that basis.

"THE COURT: Does the word 'minimum' have any significance that you can think of? 'Basis 96 degrees minimum polarization'.

"THE WITNESS: No, not especially to me. I mean I don't recollect whether on the other contracts that has been mentioned at all.

"THE COURT: 'Basis 96 degrees polarization' would mean the same thing to you then as 'Basis 96 degrees minimum ----'

"THE WITNESS: Yes.

"THE COURT: '---polarization'?

"THE WITNESS: Yes, I would have read it as that."

(Tr. 217-218)

In short, as the word "basis" suggests, 96° is the bench mark from which the system of premiums and penalties is applied to calculate the final purchase price on all sugar sales. Thus, to the Association, as to anyone else in the sugar industry, the Bank's cable meant that the sugar was not polarizing within the 94-98° range. Since the sugar polarized at 95.176358° (Ex. 49), the cable was false.

The only polarization "requirement" of the letter of credit, the breach of which would call for the large price reduction requested by the Bank, is contained in the requirement that the product be "raw sugar"--i.e. polarize at 94° or above. The sugar met this requirement.

The Bank, which in the words of the District Court "did not then understand, nor does it now understand the meaning of the [term] basis ninety-six degrees minimum polarization," offered no evidence rebutting

the trade meaning of the cable. And this meaning must govern; the Association, a member of the trade, relied upon the statement (R. 107, 108). Letters of credit are to be construed in accordance with the customs of the trade--and against the writer. See Fair Pavilions, Inc. v. First National City Bank, 24 App. Div. 2d 109, 264 NYS 2d 255 (1965), rev'd on other grounds, 19 NY 2d 512, 281 NYS 2d 23 (1967)

The lower court's finding that the cable was false is fully supported by the evidence.

II. The Bank is not relieved of its obligation to the Association by virtue of the Association's post-trial settlement with Greenberg.

Actually the Bank's primary point here is unrelated to the trial result. The Bank does not contest either the District Judge's determination that it was grossly negligent in passing Greenberg's falsehoods on to the Association over its own signature (Tr. 310), or the Court's conclusion that the Bank's quarrel with the shipping documents was "an afterthought" (Tr. 309), or the finding that

the entry charges claimed by the Bank were "fictitious" (ibid). Instead, the Bank argues that, even if it should have paid the Gardenia Letter of Credit in full at the time, as the Court below held, it was later relieved of its liability because, after the Court had ruled, the Association settled its claims--largely unrelated to the Gardenia transaction--with the bankrupt Greenberg in order to avoid a useless trial.

A. A letter of credit is not a suretyship.

1. The Bank first suggests that a letter of credit is a suretyship. This is not the law. The official comments to the Uniform Commercial Code (which has been adopted in Oregon) make this quite clear (UCC § 5-103, Uniform Code Comment 3; ORS 75.1030):

> "The issuer is not a guarantor of the performance of these underlying transactions."

UCC § 5-101, Comment, labels the "occasional ***

excursions into the law of guaranty" as a source of letter of credit law as "unfortunate."[1]

The differences between suretyship and a letter of credit relationship are many and obvious. In Oregon, a surety is one who "promises to protect the promisee only in case a third party, who is primarily liable on the obligation, fails to perform." The creditor seeks recovery from the surety "only in the event of default by the principal debtor." Atterbury v. Carpenter, 321 F.2d 921, 923-924 (9th Cir. 1963).

The issuer of a letter of credit, on the other hand, undertakes a primary obligation. He agrees to pay on presentation of the shipping documents, long before the buyer even receives the goods. The buyer's refusal to pay, or the

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[1] Because of the disadvantages of a guaranty theory, including the "danger of releasing parties secondarily liable in the course of dealings with the principal debtor," Hershy, Letters of Credit, 32 Harv. L. Rev. 1, 14 (1918), long ago concluded that "the value of letters of credit would be seriously impaired if a guaranty theory were to be adhered to...."

seller's inability to collect from the buyer, is not a condition precedent to the issuer's liability. The issuer is not concerned with the state of affairs between the buyer and the seller. He is bound to honor his promise "regardless of whether the goods or documents conform to the underlying contract for sale or other contract between the customer and the beneficiary." UCC § 5-114(1); ORS 75.1140(1).[2]

This rule works both ways--as a protection to letter of credit issuers, and as the measure of their obligations. If it

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[2] The letter of credit constitutes the sole contract with the shipper, and "the bank issuing the letter of credit has no concern with any question which may arise between the vendor and the vendee of the merchandise for the purchase price for which the letter of credit was issued." Lamborn v. Lake Shore Banking & Trust Co., 196 App. Div. 504, 506, 188 NYS 162, 163, aff'd 231 N.Y. 616, 132 N.E. 911 (1921).

See also American Steel Co. v. Irving National Bank, 266 F. 41 (2d Cir. 1920); Bank of East Asia v. Pang, 140 Wash. 603, 249 P. 1060 (1926); and cases collected and discussed in McCurdy, Commercial Letters of Credit, 35 Harv. L. Rev. 715, 724-730 (1922).

were otherwise, and if the issuer's liability turned on the underlying state of affairs between the buyer and seller, letters of credit could not safely be paid until the goods were delivered. No bank would accept the risk of paying against documents. There would be precious little letter of credit financing, if this were the law.

A surety, on the other hand, is not liable unless and until his principal is liable and defaults. Thus, the principal's defenses--and the release of the principal--are available to the surety. See 10 Williston, Contracts, § 1214, at 714 (Ed. W. Jaiger 1967). By contrast, in letter of credit law, where the documentary conditions of the letter of credit are met, the Bank may pay--and must pay. It is not obliged to, and may not, go behind the documents and refuse payment, for instance, on the ground that the goods are defective. Whether the buyer is liable on the goods is of no moment to the Bank. See Kingdom of Sweden v. New York Trust Co.,

197 Misc. 431, 96 NYS 2d 779 (Sup. Ct. 1949). The issuer buys documents--not goods.

In fact, the Bank's Assistant Vice President, Mr. Sirianni, claimed that this was the Bank's own view of the matter (Tr. 56):

"Q ... In this situation where you are using a Letter of Credit, what role does the actual commodity play?

"A The commodity to the Letter of Credit plays very little role. The documentation is the more important thing.

"Q In other words, do you make any check of the commodity--if the documents are in proper form, do you make any attempt to ascertain whether or not the commodity is satisfactory?

"A Not at all.

"Q To illustrate a situation, could the documentation call for the sugar of a certain polarization, and if the documents are in a proper form, you would pay?

"A Yes.

"Q And the shipment could actually turn out to be flour or salt or something like that?

"A Yes."

Thus, to address ourselves to this specific case, a release between buyer and seller will also release a surety. But such

modification of the underlying transaction can have no such effect on the rights and obligations of an issuer of a letter of credit. In Dulien Steel Prods., Inc., v. Bankers Trust Co., 189 F. Supp. 922 (S.D.N.Y. 1960), aff'd 298 F.2d 836 (2d Cir. 1962), for example, the defendant bank had confirmed a letter of credit, to pay a commission. The letter of credit called for payment by the bank against documents. After the credit was issued, the customer and a party related to the beneficiary agreed to reduce the amount of commissions. The documents were presented and paid, nonetheless. The question was whether or not the customer was liable to the bank. The court held for the bank, stating:

> "When a bank confirms a letter of credit the letter evidences its irrevocable obligation to honor the drafts presented by the beneficiary upon compliance with the terms of the credit. The letter is quite independent of the primary agreement between the party for whose account it is issued and the beneficiary, or of any underlying transactions. Neither the issuing nor the confirming bank has any obligation, and is not permitted to go behind the terms of the letter and the documents which are required to be

> presented, and to enter controversies between the beneficiary and the party for whose account the letter was opened concerning any other agreements or transactions. Id. at 927. (Emphasis supplied.)

In short, the Bank in this case was not a surety and cannot claim as a surety that it is entitled on that account to escape its letter of credit liability by virtue of the settlement between the Association and Greenberg.

2. Furthermore, if the Bank were right in claiming that it was only a surety, then the trial below was a waste of time and should never have been held. The Bank could not have been liable if it were indeed only a surety until the Court first determined that Greenberg was liable. The Bank should have insisted that the case against Greenberg be tried first.

Instead, the parties went to trial on the Bank's liability under its letter of credit. That trial of the claim against the Bank was a practical way to simplify the

complex issues before the Court, and was based on a sound view of the law. All the parties were content with the proposition that the Bank could be liable on the letter of credit even if Greenberg had no enforceable obligation on the underlying sales contract. It is of no concern to the Bank whether the seller simply ignores the buyer or actually releases him, and the Bank accepted this view at the time. The Bank cannot claim now, at this late date, that it was only a surety and thus no longer obliged to live up to its obligations, solely because Greenberg settled his (after a judicial determination against the Bank).

Moreover, application to the present case of the rule of release urged by the Bank would not serve the purposes generally advanced for the rule in the context of suretyship. Here the customer has agreed that the Bank may have a judgment against him for the amount the Association collects from the Bank (R. 115). Thus, any right of subrogation by the Bank to

the claim of the Association against the customer is not impaired and the Bank's risk is not varied by the release. Nor is the purpose of the release frustrated by allowing the Bank to recover over against Greenberg. He has expressly agreed that the Bank may do so.

Application of the law of suretyship to letters of credit would serve only to impair the utility of documentary commercial letters of credit by subjecting them to technicalities reducing the very certainty of payment which such credits are designed to provide.

B. Even if the Bank were a surety, it could not escape the judgment.

Even if the Court should adopt a general suretyship theory, this would not release the Bank on the facts of this case.

1. In the first place, if the release of the principal is made with the acquiescence or consent, express or implied, of the surety, the surety is estopped from disclaiming liability because of the release.

See Wyoming Construction Co. v. Western Casualty & Surety Co., 275 F.2d 97 (10th Cir.), cert. denied 362 U.S. 976 (1960); Trinity Universal Ins. Co. v. Gould, 258 F.2d 883 (10th Cir. 1958). Since the Bank's counsel was well aware of the impending arrangement and made no objection to it, the Bank may not now be heard to claim that Greenberg's release served also to release the Bank. See Sormanti v. Deacutis, 79 R.I. 361, 89 A.2d 191 (1952).

The mutual release by Greenberg and the Association was negotiated during the course of the trial of the Association's claim against the Bank. It was clearly predicated on Greenberg's insolvency and the consequent prospect of fruitless litigation of the remaining issues between Greenberg and the Association (R. 128). It was apparent, of course, that all issues relating to the Bank would be settled at the conclusion of the first trial. Though the Bank did not expect to be affected by it, the Bank's counsel was

fully apprised of the proposed arrangement--as was the Court (R. 129).

At no time did the Bank object. At no time did it suggest that a dismissal or release of Greenberg might discharge the Bank. At no time did it request that the Bank be mentioned in any settlement. Counsel did nothing to disabuse the parties of the well-founded impression that a dismissal of the contest between the Association and Greenberg was wholly acceptable to the Bank. Thus, the Bank tacitly acquiesced in the arrangement, and must be deemed to have waived its right to object to it or to claim any right under it. It can hardly be heard to complain now (See R. 125) that the release and dismissal papers, as finally executed, made no mention of the Bank.

2. And there is yet another exception to the general suretyship rule which precludes the Bank from asserting the Greenberg release. A surety who has taken

ecurity as indemnity against a possible loss rom his undertaking is not released by the reditor's release of the principal.[3] And he Bank had security--and abandoned it.

The "Agreement for Commercial Letter f Credit" (Ex. 21) between the Bank and reenberg provided in part as follows:

> "You /the Bank/ are hereby given a specific claim and lien on all goods, and the proceeds thereof, which have been purchased under said credit ... with full power and authority to take possession and dispose of the same at your discretion .... We hereby authorize you to charge our /Greenberg's/ account or accounts with you with any and all amounts that may, at any time or times, be owing from us to you hereunder.
>
> * * *
>
> "Any proceeds of said goods coming into the hands of UNITED STATES NATIONAL BANK OF OREGON are to be applied against any drafts or acceptances under this credit, or against any other indebtedness of ours to the bank, including all expenses incurred, commissions, and interest."

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[3] Jones v. Ward, 71 Wis 152, 36 NW 711 1888); Stearns, Suretyship, Sec. 102 (2d d. 1915)

The Bank was protected against loss on the Gardenia shipment by the "back-to-back" Schroder letter of credit. On the basis of the documents submitted by the Association, Schroder paid the Bank $548,366.45, on August 26, 1966 (R. 72). From this amount the Bank deducted money Greenberg owed the Bank and turned the remaining $473,000 over to Greenberg. The Bank thus had ample security. It allowed that security to evaporate (Tr. 107-108). Thus, even if the Bank were a surety--which we think it was not--it breached its "duty to the creditor to retain the security and in the event of the principal's default to utilize the security to satisfy the principal's duty to the creditor..." Restatement, Security § 140 (1941).

Any loss the Bank may sustain will occur, as the District Court found, as the result of the Bank's own "gross negligence" in August and September of 1966 (Tr. 310), and not as the result of the post-trial release.

he decision of the District Court insures that he letter of credit will serve its intended urpose of insulating the Association from reenberg's insolvency. The Bank was paid or its promise to pay the Association. It as in turn protected by its agreement with reenberg, and by the proceeds of the sugar. hat it let those proceeds slip through its rasp is no fault of the Association. The ssociation has fulfilled the conditions of he letter of credit, and should now be paid y the Bank. The Bank--even if a surety, hich we think it was not--should not be llowed to shift to the Association the onsequences of the Bank's grossly negligent ailure to enforce the provisions of its own ontract with Greenberg.

C. The Greenberg settlement did not mitigate the Bank's Letter of Credit liability.

Alternatively, the Bank falls back n the theory that it is entitled to benefit rom the post-trial settlement with Greenberg

even if it is not a surety. For this proposition it relies on ORS 75.1150(1).

This statute permits a beneficiary of a letter of credit to recover the face amount of a wrongfully dishonored draft "less any amount realized by resale or other use or disposition of the subject matter of the transaction." (Emphasis added) The statute thus refers to a situation where an issuer returns the subject matter of the sale to the seller--in this case, 5,000 tons of sugar. Of course, in these circumstances, the seller's claim on the letter of credit would be reduced by the proceeds of the resale of the sugar.

Here, however, the Association did not get the sugar back and did not resell it. Instead, the Bank accepted the Association's shipping documents, negotiated the documents to the eventual purchaser, received the full proceeds of over $500,000, and neither returned the sugar nor paid the Association what was

ue under the Letter of Credit. The subject atter of the transaction--5,000 tons of sugar-- assed to the eventual purchaser. It did not o back to the Association for "resale or other se." ORS 75.1150(1) does not apply.

The Bank apparently goes on to suggest, owever, that the "subject matter" language of RS 75.1150(1) should be stretched to include a upposed value received by the Association in ettling its various controversies with Greenberg fter the Bank had been held liable on the ardenia letter of credit. This suggestion ay be quickly disposed of.

The Association's complaint against reenberg stated a variety of causes of action-- reach of fiduciary duty arising out of long ast transactions, violation of the Robinson- atman Act, retention of the Association's rofits on other sugar sales--as well as a laim for the Gardenia shipment; by the same oken, Greenberg's claims against the Associ- tion had nothing to do with the Gardenia

transaction. The Association's complaint against the Bank, on the other hand, related only to the Gardenia letter of credit.

The Gardenia claim against the Bank was, of course, tried first. The Court held against the Bank. The Association therefore had a recovery from the Bank. It could not recover twice. At this point, then, the Association's claim against Greenberg for the Gardenia moneys was superseded.

Also at this point, Greenberg was judgment proof. On the afternoon of Friday, October 27, 1967, shortly after the trial between the Association and the Bank concluded with a decision in favor of the Association, counsel were advised by the Court Clerk that they should file by the following Monday the papers dismissing the issues not settled in the Bank case--that is to say, the outstanding non-Gardenia issues between the Association and Greenberg--or be prepared to go to trial on those issues (R. 130). The Association had

this point won its claim with respect to e Gardenia shipment. Further pursuit of eenberg on the non-Gardenia claims would ve been useless; he was insolvent. He was so not anxious to pursue his own claims ainst the Association. So the Association d Greenberg agreed to dismiss their claims d release each other. The Association's ear and single purpose in the settlement is own by the letter transmitting the release Greenberg, which states that the Association uld set the release aside if Greenberg's position testimony as to his financial ndition proved false (R. 132-133).

So it is obvious that the settlement d no practical significance to the Gardenia ansaction; the Association had recovered actically all it claimed on the Gardenia ansaction and the only remaining claims of nsequence against Greenberg were unrelated. is also obvious that, in fact, the Associ- ion received nothing of any value in the

Greenberg dismissal which the Bank is entitled to apply in mitigation of its own letter of credit liability.

In the absence of any compelling practical reason for giving the release the effect the Bank claims for it, the clear intent of the parties to the release should govern. Applying Oregon law in Rudick v. Pioneer Memorial Hospital, 296 F.2d 316 (9th Cir. 1961), the Ninth Circuit has held that the release of one party will operate to release another only if that was the manifest intent of the releasing party. In the instant case, the only parties mentioned in the release were Greenberg and the Association, and the only reason for the release was the avoidance of litigation which was doomed to futility because of Greenberg's insolvency. The language of the release, the already announced finding against the Bank and the undisputed purpose of the release hardly support a conclusion that the parties

tended to release anyone other than Greenberg om the Association's claims.

And finally, it is obvious that the nk's plea comes too late. The Bank was fully vised of the proposal to avoid a useless ial with Greenberg. Its counsel attended the nference in chambers with the Court; it made protest, advanced no claim that it was fected and did nothing to arrest the letter credit trial which it now claims was super-ded by that very settlement (R. 129-130). e Bank can hardly say now that it is relieved its adjudicated liability for its own "gross gligence" on the Letter of Credit because of e post-trial settlement with Greenberg.

CONCLUSION

For the reasons set forth above, the judgment of the District Court should be affirmed.

Respectfully submitted,

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